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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 530

IDA LAURA SIGLER and
DEAVEY LESTER SIGLER,

Plaintiffs-Petitioners,

vs.

ALLSTATE INSURANCE COMPANY,
a foreign Corporation,

Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners herein pray that a Writ of Certiorari be issued to review the order of the Circuit Court of Appeals for the Seventh Circuit affirming judgment entered by the United States District Court for the Eastern District of Wisconsin on December 20, 1962, wherein the Court, the Honorable Omer Poos, U. S. District Judge, presiding, granted defendant's motion for summary judgment and dismissed the complaint of the plaintiffs.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit of July 12, 1963, as entered is copied in Appendix A (post p. 10).

The opinion and order made and filed on December 20, 1962 in the United States District Court for the Eastern District of Wisconsin, Honorable Omer Poos, District Judge, presiding, is copied in Appendix B (post p. 15).

QUESTIONS PRESENTED FOR REVIEW

1. When the agents of an insurance company falsely and deliberately misrepresent to a claimant that the time within which to commence an action is two years when, in fact, it is only one year and falsely and deliberately advise the claimant that it is not necessary to commence an action because settlement of their claim is imminent and the claimants rely on such false representation and as a result lose their right to sue (by the running of the one-year statute of limitations), is such claimant entitled to a trial in a separate action commenced grounded on such fraud and deceit?

2. Under the circumstances as stated in question one, if the claimants retain counsel nineteen days before the one-year limitation is up, is the insurance company defendant thereby excused for the 346 days that fraud and deceit was practiced on the claimant and is such defendant then entitled, *as a matter of law*, to have summary judgment granted in a subsequent action grounded on fraud?

JURISDICTION

The order of the Honorable Omer Poos, presiding judge of the United States District Court for the Eastern District of Wisconsin, was entered on December 20, 1962 and the order of the United States Court of Appeals for the Seventh Circuit was made and entered on July 12, 1963.

Jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C., Sections 1254(1) and 2101 (c).

STATEMENT OF THE CASE

Plaintiffs' complaint alleges that when she was a passenger in her husband's vehicle there was a collision with another vehicle in the State of Kentucky, June 29, 1956, as a result of which plaintiff sustained substantial injury. The complaint alleges that the plaintiffs on June 6, 1957, called upon representatives of the defendant insurance company, at which time, they were informed that a $7,500.00 settlement offer had been referred to the home office for approval and "re-assured plaintiffs that it was not necessary to file court action in view of the imminent settlement and further, that they had a two-year period in which so to do."

The complaint then alleges that the plaintiffs, pursuant to instructions from the defendant, obtained and furnished additional medical information from a Kentucky physician and on September 9, 1957, the agent of the defendant informed the plaintiffs that settlement was refused because of the expiration of the Statute of Limitations.

In the third defense, in the answer of the defendant, it is alleged that on June 10, 1957, attorneys for the plaintiffs notified the defendant in writing that they had been

retained by the plaintiffs as the attorneys representing the plaintiffs. The defendant received the notice on June 11, 1957, and it appears this date was nineteen days prior to the Statute of Limitations taking effect for the start of a legal action.

Paragraph seven (VII) of the complaint of the plaintiffs alleged that the defendant's adjuster called repeatedly at the home of the plaintiffs at weekly intervals and repeatedly assured them that they, the plaintiffs, had two (2) years in which to commence any action, and requested the plaintiffs to withhold court action inasmuch as settlement was being negotiated, and this course of conduct on behalf of the defendant continued from the date of the accident up to the twelfth month following. In paragraph ten (X) of the plaintiffs' complaint the plaintiff further alleges that she has no legal experience, knowledge or training, has no knowledge of the laws of the Commonwealth of Kentucky relating to the Statute of Limitations; that said plaintiff relied on the fraudulent representations of defendant's agents as above set forth, believing the same to be true and without knowledge of the falsity thereof, and was induced by said representations to withhold the filing of any action until after the expiration of the Statute of Limitations. In this action the plaintiffs are seeking relief for damages to which they are justly entitled and which have been denied them because of the fraudulent and deceitful conduct of the defendant, which resulted in the running of the one-year Statute of Limitations in Kentucky.

The defendant's motion for summary judgment was granted and, on appeal the judgment of the district court was affirmed by the U. S. Court of Appeals for the Seventh Circuit, all as appears in Appendixes A and B herein.

ARGUMENT

In plaintiffs' action against the defendant's fraud is the gravamen of the action. All the elements required to base a law action on fraudulent representations have been clearly spelled out—that representations were made, their falsity, defendant's intent to deceive, the deception, the belief by the plaintiffs and reliance thereon, and the resulting change of the plaintiff's position as a direct and proximate result thereof to their detriment. The defendant has denied such allegations by their answer and there has thus been created an issue of fact requiring a trial. Since there are material issues of fact raised by the pleadings and not answered on the record, the defendant's motion for summary judgment must be denied.

In *Delson vs. Minogue*, Civ. A. No. 19692, United States District Court, E. D. New York, 1961, 190 FS 938, the Court stated:

> "Assuming *arguendo* that the facts set forth in the answering Affidavit are true, an issue of fact is created as to whether the defendants conduct caused plaintiffs to change their position to their detriment. The defendants urge that the plaintiff, having retained a lawyer, demonstrated that they no longer were relying on the defendants' conduct or representations; plaintiffs could have commenced an action prior to October 27, 1958. Though plaintiff *could have* commenced an action within the 24-day period remaining in the one-year limitation, it can not be said that the plaintiffs were not prejudiced if relying on the defendants' representative, plaintiffs were led to believe that the matter was to be settled and it was inadvisable to retain counsel. The period within which they may have brought the action for all practical purposes, has been shortened by some 341 days." (Emphasis by Court)

The facts in the *Delson* case are on all fours with the case at bar. A similar determination is reached in *Bergeron vs. Mansour*, 1 Cir., 1945, 152 F. 2d 27, where the claim adjuster carried on negotiations for a full year after accrual of the cause of action and then advised the plaintiff that the claim was barred.

In the *Delson* case the Court held that a fact question was presented with regard to whether defendants' conduct had caused the plaintiffs to change their position to their detriment so as to equitably estop defendants from asserting limitations defense. Motion for summary judgment was properly denied.

In accord with the modern trend in all jurisdictions as summed up in *A. L. I. Restatement of Torts*, sec. 540:

> "The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation."

In affirming the determination of the District Court, the United States Court of Appeals for the Seventh Circuit has taken a position diametrically opposed to that of the authorities previously cited herein. This Honorable Court should resolve the conflict thus created. Your Petitioner respectfully submits that in the interests of justice he should be permitted his day in Court and that summary judgment should here be denied.

Both the District Court and the Court of Appeals have overlooked the fact that material issues of fact have been raised. If the plaintiffs' contentions are true, certainly the defendant should not be permitted to escape his just liabilities.

In *Scarborough vs. Atlantic Coast Line Railroad Company*, (4th Cir.), 178 Fed. 2d 253, 258, the Court stated:

> "One can not justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the Statute of Limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought."

In *Glus vs. Brooklyn Eastern Terminal*, 79 S. Ct. 760 (1959), the Court states:

> "To decide the case we need look further than the maxim that no man can take advantage of his own wrong . . . we hold that it was error to dismiss this case. Despite the delay in filing his suit (plaintiff) is entitled to have his cause tried on the merits if he can prove that (defendants') responsible agents, with some authority in the particular matter, conducted themselves in such a way that (plaintiff) was justifiably misled into a good-faith belief that he could begin his action within seven years after it accrued."
>
> "It is no answer to say as (defendant) does, that the representations alleged were of law and not of fact and therefore could not justifiably be relied on by (plaintiff). *Whether they could or could not depends upon who made them and the circumstances in which they are made.* . . . Such questions can not be decided at this stage of the proceeding. (Emphasis ours)

CONCLUSION

It is respectfully prayed by Petitioners that a writ of certiorari directed herein to the United States Court of Appeals for the Seventh Circuit and that in due course the issues involved be ruled upon by this Honorable Court.

Respectfully submitted,

SYDNEY M. EISENBERG
EDWIN A. STAR

Attorneys for Petitioners
DEWEY SIGLER and
IDA LAURA SIGLER

P. O. ADDRESS:
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CERTIFICATE

As one of the attorneys for Ida Laura Sigler and Dewey Lester Sigler, petitioner-above named, I do hereby certify that a printed copy of the foregoing, together with the appendixes, have been served on the Honorable Robert E. Tehan, Judge of the United States District Court for the Eastern District of Wisconsin, on Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, on Arnold, Philipp & Murray, Attorneys for the Allstate Insurance Company, and on Solicitor General, Department of Justice, Washington 25, D.C. by placing 3 copies of same in the United States mail, directed to each of them at their respective offices, postage prepaid.

Dated, Milwaukee, Wisconsin, this 8th day of October, 1963.

Edwin A. Star
Attorney for Petitioner.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14080 SEPTEMBER TERM, 1962 APRIL SESSION, 1963

IDA LAURA SIGLER and DEWEY LESTER SIGLER,
Plaintiffs-Appellants,
vs.
ALLSTATE INSURANCE COMPANY, a foreign corporation,
Defendant-Appellee.

Appeal from the District Court for the United States for the Eastern District of Wisconsin.

July 12, 1963

Before HASTINGS, *Chief Judge*, and SCHNACKENBERG and KNOCH, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Ida Laura Sigler and Dewey Lester Sigler, plaintiffs, have appealed from a summary judgment entered by the district court, which sustained a motion of Allstate Insurance Company, a foreign corporation, defendant, and dismissed a complaint filed by plaintiffs.[1]

[1] Plaintiffs' action against defendant had been commenced in the Circuit Court of Milwaukee County, Wisconsin, and had been removed to the district court.

Plaintiffs' complaint alleged that, on June 29, 1956, in the State of Kentucky, Leonard W. Clark, a resident of Chenoa, Illinois, was operating an automobile in a negligent manner, by means of which it collided with an automobile operated by plaintiff, Dewey Lester Sigler, in which plaintiff, Ida Laura Sigler, was a passenger, and, as the direct and proximate result of which negligence, she was injured.

The complaint further alleged that defendant had issued a policy of insurance to said Clark covering liability or loss, which policy was in full force and effect at the time of said accident; that, during July 1956, an adjuster representing defendant called at plaintiffs' home for the ostensible purpose of assisting in providing medical attendance and appliances, and, at that time, stated to the plaintiff that she had two years in which to file claim in this action; and that Rudolph Egner, successor to the said adjuster, called at plaintiffs' home at weekly intervals during the following nine months, in the course of which he commenced settlement negotiations, and in the course of which he repeatedly assured plaintiff, Ida Laura Sigler, that she had two years after the accident date in which to file her claim and requested that these plaintiffs withhold court action, inasmuch as settlement was being negotiated.

The complaint also alleged that on June 6, 1957, at the request of defendant's agents, both plaintiffs called at the office of defendant and were there told by a company representative that a $7500 settlement offer had been referred to their home office for approval, reassured plaintiffs that it was not necessary to file court action in view of the imminent settlement and further that they had a two-year period in which so to do.

The complaint further alleged that, on September 9, 1957, "defendant's agent communicated with plaintiffs' presently employed Counsel that settlement was refused and said plaintiffs' claim was rejected because of expiration of limitations * * * that within the two-year period *** plaintiff did commence suit" in the Hopkins Circuit Court in the State of Kentucky, and "that said suit was dismissed". The record shows this dismissal order was entered on December 22, 1958, on motion of defendant, Leonard W. Clark, on the ground that it was not filed in time to comply with §413.140(a) of the laws of the Commonwealth of Kentucky, which provides that such an action shall be commenced within one year after the cause of action accrues.

Defendant filed an answer to the complaint, which denied, *inter alia*, that any representative of defendant told either plaintiff that they had two years within which to commence an action.

On June 10, 1957, Sydney M. Eisenberg,* an attorney of Milwaukee, Wisconsin, sent the following letter to defendant:

> This letter is to advise you that I have been retained by Ida and Dewey Sigler of 2516 West Lisbon Avenue, Milwaukee, Wisconsin, to collect for damages and injuries sustained by them on the 29th day of June, 1956, as a result of negligence on the part of your insured Leonard W. Clark of Chenoa, Illinois. This accident happened in Nortonville, Kentucky.
>
> Please construe this letter as a formal notification of my attorney lien rights as required under the Statutes of the State of Wisconsin.
>
> This letter is not to be construed as a threat of litigation. Please address all communications to this office.

*Mr. Eisenberg appeared on behalf of plaintiffs in this court.

On the hearing of defendant's motion for summary judgment, there were submitted to the district court affidavits of each of the plaintiffs, which reiterated their charges that representatives of defendant had told them that they "had two years in which to file a suit".

It was unnecessary for the district court to resolve the apparent conflict as to whether the statements attributed by plaintiffs to defendant's representatives were actually made. With able counsel representing them, plaintiffs nevertheless permitted the Kentucky statute of limitations to run and bar their claims. It is evident that some time prior to the writing of the letter of June 10, 1957 to defendant, attorney Eisenberg had been retained by both plaintiffs to enforce their cause of action against defendant's insured, Clark. His letter so indicates. Plaintiffs nevertheless waited at least 19 days after retaining counsel and the one year statute of limitations of Kentucky in due course barred their action against Clark. In the city of Milwaukee, Wisconsin, where plaintiffs live and their attorney practices, the availability of law books and recourse to the statutes of the Commonwealth of Kentucky would have furnished information as to Kentucky's statutes relating to negligence actions.

Even if 19 days were required to go to Kentucky and file a suit there, neither of such steps was required in this case. A suit against Clark could have been filed in the federal court in Illinois, where Clark lived. We find no escape for plaintiffs from these undisputed facts which, by no liberal interpretation can be construed as a bar to the running of the Kentucky limitations act.

For these reasons, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN DATED DECEMBER 20, 1962

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

IDA LAURA SIGLER and DEWEY LESTER SIGLER,
Plaintiffs-Appellants,

vs.

No. 14080

ALLSTATE INSURANCE COMPANY, a foreign corporation,
Defendant-Appellee.

ORDER

This cause having come on for hearing before the Court on defendant's motion for summary judgment, the Court, being in all respects fully advised in the premises, makes the following order:

THE MOTION OF THE DEFENDANT FOR SUMMARY JUDGMENT IS GRANTED because the representations as to the time within which the suit was to be brought alleged to be made by agents of the defendant are not grounds for actionable fraud for the following reasons: (1) Law of a foreign state as to which misrepresentations were allegedly made was a matter

which plaintiffs' attorneys were bound to investigate in the nineteen day period prior to the expiration of the time for filing suit after they had been advised by their client of the facts constituting her claim. The law on this matter is stated in *Rekeweg, et al v. Federal Mutual Insurance Company* (N.D. Indiana 1961) 27 F.R.D. 434, at page 436 where it is said:

> "When counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter, and may not claim that they are not required to know the law of the foreign State."

(2). The misrepresentations alleged to have been made by the defendant's agents were promises to do something in the future or statements of opinion as to future events and as to matters of law. That such statements do not constitute actionable fraud is clear from *Gauthier vs. Atchison, Topeka & Santa Fe Railway Co.*, (1922) 176 Wis. 245 at page 249 ff.

Accordingly, the Court grants defendant's motion for summary judgment and the complaint is hereby dismissed.

Entered this 20th day of December, 1962, at Milwaukee, Wisconsin.

s/ Omer Poos
U. S. District Judge